IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1168

STATE OF ARIZONA, RICHARD BOYKIN, SHERIFF, PIMA COUNTY, ARIZONA,

Petitioner,

v.

GEORGE WASHINGTON, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The Opinion of the Court of Appeals (App. 22-34) is reported at 546 F.2d 829.

The Opinion of the Arizona Supreme Court, filed June 20, 1974, (App. 7-15 & 35) (pages in the Appendix are out of order) is unreported.

JURISDICTION

The Petition for Writ of Certiorari herein was not timely filed in that it was not filed with the Clerk of this Court within thirty (30)

days after the entry of the Judgment of the United States Court of Appeals for the Ninth Circuit as required by Rule 22(2) of the Rules of this Court, and no extension of time for applying for a Writ of Certiorari was requested or obtained. See *United States ex rel. Coy v. United States,* 316 U. S. 342 (1942); *Cf., Schlanger v. Seamans,* 401 U. S. 487, 490 n.4 (1971); *Harris v. Nelson,* 394 U. S. 286 (1969). Therefore, this Court may dismiss Petitioner's Petition herein as improvidently granted.

QUESTIONS PRESENTED

Petitioner's framing of the questions presented appears unnecessarily verbose and repetitive, deviates from the form of questions presented in its Petition for Writ of Certiorari, and is unrelated to the organization of its Brief. Respondent, therefore, has organized his argument under the following two questions, the first of which appears to Respondent to be an accurate condensation of the first three questions presented by Petitioner (Petitioner's Brief 13-14), and the second of which appears to Respondent to be an accurate condensation of the fourth question presented by Petitioner (Petitioner's Brief 14).

Within the protection afforded by the Due Process Clause of the Fourteenth Amendment and the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States:

1. Did the Court of Appeals' Opinion in this case require that a trial court make a specific finding of manifest necessity or consideration of alternatives to mistrial before granting a mistrial, regardless of the circumstances of record, and should retrial, therefore, be required?

2. Did defense counsel deliberately provoke a mistrial in this case, and should retrial, therefore, be required?

STATEMENT OF THE CASE

Respondent believes that Petitioner's Statement of the Case in its Brief is unnecessarily verbose and contains inaccuracies, unwarranted characterizations, and innuendoes. Thus, Respondent submits the following:

On May 21, 1971, George Washington, Jr., was found guilty by a jury of first degree murder, arising out of an incident in which a hotel night clerk was killed in the course of a robbery on December 13, 1970. Thereafter, the trial court granted a new trial "on the grounds of violation of due process and newly discovered evidence." (App. 6.) On appeal by the prosecution, the Arizona Supreme Court affirmed the grant of a new trial. The unanimous court wrote:

> The rule in Arizona at the time of the alleged offense was Rule 311 . . . which states in part that:
>
> "A. The court shall grant a new trial if any of the following grounds is established, provided the substantial rights of the defendant have been thereby prejudiced:
>
> . . .
>
> "5. *That the county attorney has been guilty of misconduct.*[1]
>
> . . .
>
> "B. The court shall also grant a new trial when from any other cause not due to his own fault the defendant has not received a fair and impartial trial."
>
> Defendant argues for a new trial on the ground that he was prejudiced by the deliberate suppression of evidence by the State.
>
> On the issue of suppression of evidence, the United States Supreme Court has stated in *Brady v. Maryland* . . . that:
>
> "[T]he suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material to guilt or to punishment."
>
> . . .

[1]Emphasis added.

In the case at bar, an alleged eyewitness named Hanrahan told the Tucson Police Department, the Pima County Sheriff's Department and the Pima County Attorneys' Office that he had seen the murderer flee from the scene of the crime and that it was *not* the Defendant. The murderer was vividly described by Hanrahan as a Negro male, very heavy set, with a pot belly, no moustache, and sporting a very big Afro hair style. Defendant is a much lighter weight Negro male with a crew cut and a moustache.

Hanrahan subsequently changed his story. However, the initial statements of Hanrahan which tend to absolve Defendant from criminal liability were never disclosed to the defense counsel nor to the court.

There is no evidence more valuable to a defendant than the testimony of an eyewitness that he did not commit the crime in question. The prosecution has an affirmative obligation to assure that a defendant receives a fair trial. The suppression of evidence was clearly prejudicial to the Defendant and a new trial was warranted. (App. 9, 35, 10.)[2]

Additionally, the court held that the grant of a new trial was affirmable on the ground that eyewitness Hanrahan's original statements constituted newly discovered evidence unknown to the defense at the time of trial despite diligent inquiry. (App. 10-14.) The court recognized defense counsel's efforts to ascertain the nature and extent of Hanrahan's knowledge of the murder. (App. 12.) Pointing out that when Hanrahan had been interviewed by defense counsel, the prosecution had taped a concealed microphone and transmitter to Hanrahan's body, enabling the prosecution to eavesdrop upon and record the conversation between Hanrahan and defense counsel (App. 12-13), the Arizona Supreme Court concluded, "that any attempt by defense counsel to obtain information from Hanrahan would have been futile because of the close working relationship between Hanrahan

[2]The Appendix prepared by the Petitioner presents the pages of the Opinion out of order. The matters set forth below were contrary to the agreement reached between counsel for the parties herein as to what was to be included in the Appendix: Petitioner's arrangement of the Arizona Supreme Court Opinion, App. 7-14, 35; and App. 275-291 were recapitulated from App. 226-227, 233, 241, 252-253, 264-266, 268-269.

and the government." (App. 13.),

The court further not

> The primary issue at trial was the identity of the assailant. No one at trial identified Defendant as the assailant. Thus, the direct eyewitness testimony of Hanrahan on the issue of the identity of the assailant, if offered at a new trial, would in no way be cumulative. Testimony as to the identity of the assailant is material for it would tend to disprove the commission of the crime by the Defendant. (App. 13.)

Respondent's new trial commenced on January 8, 1975, and during the voir dire of the jury, the prosecutor stated:

> You may also see in this case the witnesses, or many of the witnesses that have testified, or will testify before you, have testified in at least two prior proceedings, because we have transcripts of what they said four years ago. (App. 151.)

He went into some detail regarding the possibility that witnesses' testimony might be inconsistent with their prior testimony and asked, *inter alia*, "Are there any of you that would automatically say, 'That person must be a liar'?" (App. 152.) Defense counsel moved for a mistrial on the grounds that the obvious conclusion to be drawn from the prosecutor's reference to "prior proceedings" four years ago for which "we have transcripts" and the fact that the Defendant was in custody was that Mr. Washington had had a former trial and been convicted. (App. 159-163.) The motion was denied. (App. 163.) Further in his voir dire, the prosecutor stated, "The testimony will reveal that the witnesses, the actual eyewitnesses to the robbery, are unable to get up in court and point with proof positive that George Washington, Jr., was the robber." (App. 155.) In that connection, the prosecutor inquired:

> Are there any of you that do not realize that one of the purposes in carrying a weapon during an armed robbery, so that witnesses will be watching that weapon, and not the face of the robber? (App. 155.)

Defense counsel objected to the question as being improper voir dire and going "outside the record" with regard to what testimony would be admitted. The objection was sustained. (App. 155-156.)

In the course of the defense voir dire, defense counsel stated that

he was sure nobody among the prospective jurors "has any doubt what those proceedings four years ago" which the prosecutor had referred to were. He asked if the veniremen could lay aside the fact of a prior trial and simply consider the present trial. (Transcript of Defense Voir Dire 22.) Defense counsel also stated as follows:

> We think you'll hear some evidence to the fact that there was evidence hidden from George at the last trial. Now I believe that that evidence will be brought forth. Will you consider any evidence that's brought forth to you and the Judge allows us to put on the witness stand, would you consider any of that and judge the credibility of the witnesses, in other words, judge their believability based on what you hear from the witness stand, their conduct, how they act, what they testified to? (Transcript of Defense Voir Dire 22-23.)

Significantly, no objection was made to these remarks and no request was made for an instruction to the jury to disregard them.

Following the defense voir dire, the prosecutor asked if he could examine the individual jurors to determine (1) "if any of these individuals know that the motion for a new trial was granted because the State failed to produce some evidence," and (2) "if that fact would cause them to feel at this time, or that they would have some prejudice against the position of the State because of that." (Transcript of Defense Voir Dire 35.) Defense counsel did not object to such an examination. (Transcript of Defense Voir Dire 36-37.) The court fully authorized and the prosecutor thus conducted his requested examination. Thereafter, the prosecutor said that if defense counsel introduced a witness named Hanrahan, the prosecutor might call the defense attorney as a witness. (Transcript of Defense Voir Dire 55.)

In his opening statement, the prosecutor told the jury that some of his witnesses had testified at a preliminary hearing, which he said was a hearing before a magistrate. He continued:

> As the State presents its evidence and a result of that hearing, the Judge considers the evidence, makes a decision, and the result of his decision, the information is filed. (App. 169-170.)

Defense counsel objected that "that's going to be outside the record," but the trial court denied his objection. (App. 170.)

In the defense's opening statement, defense counsel stated, *inter alia*, that the defense would present a variety of exculpatory evidence. Such evidence would concern the fact that eyewitnesses had identified persons other than Mr. Washington as the suspect in the case, had given original descriptions of the suspect inconsistent with Mr. Washington's appearance, and had positively declared that Mr. Washington was not involed in the case, that he had been at a friend's home the entire day of the incident, and that various prosecution witnesses were biased or had motives to lie. Defense counsel referred to the prosecution's prior suppression of exculpatory evidence, stating:

> You will hear testimony that, notwithstanding the fact that we had a trial in May of 1971 in this matter, that the prosecutor hid those statements and didn't give those to the lawyer for George, saying the man was Spanish speaking, didn't give those statements at all, hid them. (App. 180-181.)
>
> You will hear that that evidence was suppressed and hidden by the prosecutor in that case. You will hear that that evidence was purposely withheld. You will hear that because of the misconduct of the County Attorney at that time and because he withheld evidence, that the Supreme Court of Arizona granted a new trial in this case. (App. 184.)

Again, no objections were lodged at the time these statements were made, although the prosecutor objected to other portions of the opening statement.

Following the opening statements, the court recessed for lunch. That afternoon, the prosecutor moved for a mistrial on the following grounds: that defense counsel used some argument in his opening statement; that he, the prosecutor, didn't believe the defense would be able to produce witnesses referred to; that the defense shouldn't be allowed to put on evidence of past prosecutorial misconduct in the case; and that, if the motion for mistrial were not granted, the prosecution would be "forced" to call witnesses to prove that the defense counsel was "guilty of subornation of perjury." (App. 187-190.) Defense counsel responded that "I said nothing this morning that I don't believe the evidence will show" and "that I did not honestly intend or think that I could prove in the way of evidence." He apologized for the

portions of his opening statement which were argumentative in tone, avowed that though a continuance had been unsuccessfully sought to allow additional time to locate witnesses, he believed all the witnesses referred to would be located and called. Further, defense counsel invited the prosecutor to try to prove that he had suborned perjury. (App. 191-193.) As defense counsel stated to the court, "You know it didn't happen, everybody knows it didn't happen, but if he wants to attempt to do that, that's fine, too." (App. 193.) Defense counsel offered to divulge to the court at that time *in camera* before a court reporter how he intended to get into evidence the matters referred to in his opening statement. (App. 203-204.) His offer was ignored.

The court indicated that it accepted defense counsel's avowal that he believed he could prove that which he told the jury the evidence would show. (App. 211.) Defense counsel stated that he intended to prove prosecutorial misconduct in order to attack the credibility of prosecution witnesses. (App. 211-13.)[3] The trial court acknowledged that if a prosecution witness had failed to

[3]Sgt. Larry Bunting of the Tucson Police Department was the prosecution's chief investigator in this case. Therefore, his testimony at trial would have been a crucial part of the prosecution's case. Throughout the proceedings, the defense maintained that Bunting was involved in the prosecution's failure to disclose *Brady* materials, as well as matters pertaining to Mr. Rodriguez (App. 79-80, 94-97, 100-105, 179-183) and Mr. Hanrahan (App. 7-14, 35, 37, 44, 54-76, 86-90). In addition to other damaging material which cross-examination would have revealed, Bunting's testimony of November 26, 1974, at the hearing on Mr. Washington's motion to dismiss is conspicuously telling:

> Q: You probably have told me that kind of information, but what I am talking about is back at the time of the trial in 1971, May of 1971, and before — between December — between the preliminary hearing and May of 1971, is it your testimony that you did not tell me, [next page] indicate to me, that Rodriguez was gone, but when you found him, he was going to identify George?
>
> A: I don't recall.
>
> Q: Do you deny that:
>
> A: I don't really recall any conversation. I may have said it and I may not have. There is —
>
> Q: That's —
>
> A: *There is a number of times I talked to you when I really don't tell you the truth.*

(continued)

bring some matter to the attention of the authorities or had made a deal with a witness in return for particular testimony, such might well be admissible to test his credibility. (App. 212-213.) The court denied the motion for mistrial. (App. 223-225.) Testimony of two witnesses was thereafter taken.

The next morning, the prosecutor again moved for a mistrial on the same grounds as before. (App. 226-241.) The prosecutor advised the court that he and three other attorneys researched the matter the previous night. (App. 231.) Defense counsel indicated that he had relied on the court's earlier denial of the mistrial motion and was not prepared to reargue it. (App. 242.) Nevertheless, there was a brief response. Thereafter, the following dialogue occurred between the prosecutor and the court:

> The only cure, your Honor, is a mistrial. The State is well aware that if the position I'm taking is wrong, if a mistrial is not proper, that man walks, I know that.
>
> THE COURT: And I expressed my concern about that, Mr. Butler.
>
> . . .
>
> THE COURT: Have you considered the effect that, I think, my recollection is that you failed to object for the record in point of time to that particular statement on the merits —
>
> MR. BOLDING: He did.
>
> THE COURT: — of a review of the granting of a motion for mistrial.
>
> MR. BUTLER: Yes, your Honor, I have. (App. 253-254.)

The trial judge gave defense counsel fifteen minutes to provide it with any additional legal authority. (App. 256 & 258.)

Defense counsel argued that the real reason for the prosecutor's

(footnote continued from preceding page)

> Q: Okay.
>
> A: When I am not on the stand.
>
> Q: All right.
>
> MR. BOLDING: I think that is probably indicated by the testimony, and I have no other questions.
>
> (Emphasis added.)

motion was that the jury was likely to find Mr. Washington not guilty. (App. 258 & 263-264.) Defense counsel warned that since the prosecution failed to object or request relief short of a mistrial and because Mr. Washington would not substantially prejudiced if the court granted a mistrial, the defense would move for Mr. Washington's release on double jeopardy grounds. (App. 263.)

In a patently untrue statement, Petitioner's Brief alleges that one of Mr. Washington's attorneys admitted "that there was error by the defense." (Brief of Petitioner 39.) What was said is as follows:

> I don't think this jury is inflamed or impassioned at the State. I think there's material the State doesn't want them to know about but it's clearly discretionary and if there is error, it seems to me that it's not the kind of error that has created a jury atmosphere that cannot render the State a fair trial . . . (App. 265.)

The trial court ruled as follows:

> Based upon defense counsel's remarks in his opening statement concerning the Arizona Supreme Court Opinion and its effect for the reasons for the new trial, the motion for mistrial will be granted. (App. 271-272.)

A special action[4] was brought in the Arizona Supreme Court on Mr. Washington's behalf challenging the granting of a mistrial. The Arizona Supreme Court declined to accept jurisdiction. (App. 17.) Then Respondent moved in the trial court to dismiss or quash the information against him, and, upon denial of that motion, petitioned the Arizona Supreme Court for a writ of habeas corpus, which that court denied. (App. 18.)

Thereafter, the United States District Court for the District of Arizona considered and granted Respondent's petition for a writ of habeas corpus. (App. 19-21, 81-142.) The District Court held that retrial of Mr. Washington was barred by the Double Jeopardy Clause of the Fifth Amendment as applied to the states by the Due Process Clause of the Fourteenth Amendment. Both parties

[4]By 17A Arizona Revised Statutes Annotated, Rules of Procedure for Special Actions, Rule 1, the common law actions for writs of certiorari, mandamus or prohibition are consolidated under one form of "special action."

appealed aspects of the District Court's decision. On December 3, 1976, the United States Court of Appeals for the Ninth Circuit held that the Double Jeopardy Clause barred retrial of Mr. Washington. (App. 22-34.) The prosecution thereafter petitioned this Court and the Petition for a Writ of Certiorari was granted on April 18, 1977.

SUMMARY OF ARGUMENT

I.

The Opinion of the Court of Appeals herein did not hold that a trial court must make a finding of "manifest necessity" or a statement rejecting alternatives to mistrial in order to avoid double jeopardy considerations barring retrial. It did hold that on the record of this case, it was not readily apparent that the two or three sentence reference to the decision of the Arizona Supreme Court made by defense counsel in his opening statement had prejudiced the jury to the extent of precluding a fair trial. Thus, it held that it could not presume on the face of a silent record that the trial court had given due consideration to available alternatives before declaring a mistrial.

Under Arizona law, it was appropriate to prove past prosecutorial misconduct in this case and the remarks of defense counsel which the trial court took as the basis for mistrial were permissible.

Under the circumstances of the case at bench, retrial is barred by the Double Jeopardy Clause. The substantial interests of the Defendant would be harmed by the declaration of a mistrial and by any retrial herein, whereas no countervailing public interest necessitated termination of the trial proceedings. Here, the granting of a mistrial involved great danger of prosecutorial manipulation and defense prejudice, as well as erratic and arbitrary judicial behavior.

Review of mistrial cases would be aided by requiring a showing on the record of consideration of alternatives considered by the trial court prior to declaring a mistrial.

II.

Petitioner is precluded from raising the issue of deliberate provocation of a mistrial in this case since it was not raised below. In truth and in fact, there was no deliberate provocation of a mistrial by the defense, as the record clearly demonstrates. Regrettably, Petitioner is embarked on a campaign of vilification of defense counsel. Moreover, no basis exists for departing from the standard of manifest necessity.

ARGUMENT

In view of the lengthy presentation in the Petitioner's Brief, Respondent wishes to indicate that the failure in this Brief to respond to any particular matter therein is a result of a conscious attempt to be succinct and germane, and is not intended as an admission or waiver of such matter.

DISTINCTIONS IN ARIZONA PROCEDURE

Respondent respectfully directs the Court's attention to certain distinguishing characteristics of Arizona state court procedure applicable to this case in order to avoid the misapprehension by the Court that impropriety occurred where counsel were actually conforming to the practice then accepted in this State, but deviating from the practice of many jurisdictions.

Under the rules of procedure governing this case, the trial court was required to permit counsel for both parties to conduct a voir dire examination of prospective jurors. *State v. Lovell*, 97 Ariz. 269, 272, 399 P. 2d 674, 675-676 (1965); Rule 217(A), Arizona Rules of Criminal Procedure, promulgated June 18, 1955, effective January 1, 1956 (contained in superceded Volume 17 of the Arizona Revised Statutes Annotated (1956)). And considerable latitude in framing questions propounded to prospective jurors was allowed a defendant on trial for his life or

liberty so that he could intelligently exercise his peremptory challenges. *E.g., State v. Jordan*, 83 Ariz. 248, 252-253, 320 P. 2d 446, 448-449 (1958).

Arizona has adopted the so-called "English" rule, providing that the scope of cross-examination is not limited by the scope of direct examination, but is only limited by considerations of relevancy and materiality. *E.g., State v. Gilreath*, 107 Ariz. 318, 320, 487 P. 2d 385, 387 (1971); Rule 272, 1956 Arizona Rules of Criminal Procedure, superceded Volume 17, Arizona Revised Statutes Annotated; Rule 43(g), Arizona Rules of Civil Procedure, 16 Arizona Revised Statutes Annotated; Rule 19.3(a), Arizona Rules of Criminal Procedure, 17 Arizona Revised Statutes Annotated. In Arizona, impeachment evidence such as prior inconsistent statements of a witness is admissible as substantive evidence. *State v. Skinner*, 110 Ariz. 135, 515 P. 2d 880 (1973).

I.

THE OPINION OF THE COURT OF APPEALS HEREIN DID NOT REQUIRE A TRIAL COURT TO MAKE SPECIFIC FINDINGS OF MANIFEST NECESSITY BEFORE GRANTING A MISTRIAL, AND, IN ANY EVENT, RETRIAL IN THIS CASE SHOULD BE BARRED.

A. The Opinion of the Court of Appeals Herein Did Not Require a Trial Court to Make Specific Findings of Manifest Necessity Before Granting a Mistrial.

While the "absence of any finding by the trial court or any indication that the court considered the efficacy of alternatives such as an appropriate cautionary instruction to the jury" (546 F.2d at 832, App. 30) was one of the factors considered by the court, it was careful to point out that its decision was based upon the circumstances of this particular case and that it was not

requiring trial courts to make such findings.

> We do not hold that these words are talismanic; we hold only that this particular record fails to reveal a "scrupulous exercise of judicial discretion," and that more consideration should have been given to the appellee's "valued right to have his trial completed by a particular tribunal." 546 F.2d at 832. (App. 30.)

The Court of Appeals concluded that certain of defense counsel's remarks in his opening statement (App. 25, 184) were improper, but only to the extent that they referred to what the Arizona Supreme Court had said about the conduct of the county prosecutor (546 F.2d at 832 & 832 n. 2; App. 29).[5] The court could not find such "impropriety" to be of such a magnitude that it could imply "that the jury was prevented from arriving at a fair and impartial verdict." 546 F.2d at 832. (App. 29-30 & 34.)

Two judges on the panel wrote a concurring opinion emphasizing that, not only was a finding of manifest necessity not explicitly made by the trial court, but also, such a finding was not implicit in the record. 546 F.2d at 832-833 (Opinion of Merrill and Anderson, J.J.). (App. 31-32.) They noted that the trial court in this case was required to find not only that certain conduct was improper, but moreover, that it was "such as to prejudice the jury beyond remedy by a cautionary instruction or other means and thus preclude fair trial by that jury." 546 F.2d at 832. (App. 31.)

Among the factors the court considered important in the record were the following: (1) the greater part of argument upon the mistrial motion was devoted to whether defense counsel's remarks were improper, and, specifically, whether the Arizona Supreme Court decision could be brought to the jury's attention; (2) when the motion was first argued, the Judge indicated that he would be disposed to grant mistrial if the Supreme Court decision was not admissible in evidence; (3) when first made, the motion was denied because the trial court was not ready to rule on admissibility; (4) the motion was renewed the following day,

[5] In fact, the remarks did not refer to what the Arizona Supreme Court had said, but, rather, to what it had done, "granted a new trial in this case."

at which time an Arizona rule of practice (Criminal Rule 314) was for the first time called to the court's attention; and (5) at the conclusion of this second period of argument, mistrial was granted. 546 F.2d at 832-833. (App. 31-32.) Given the foregoing, they found it "quite possible that the grant of mistrial was based on the fact that the impropriety of counsel's conduct had been established without reaching the question whether there could, nevertheless, be a fair trial." 546 F.2d at 833. (App. 32.)

An additional factor which neither Opinion notes, but which was called to the Court of Appeals' attention by the District Court (App. 129), was the prosecutor's statements to the court that he realized that if the position he was taking was wrong, Mr. Washington "walks" (App. 253) and that he was willing to take the risk (App. 225).

In essence, the Court of Appeals' Opinion held that the record did not establish that the jury had been improperly prejudiced to the extent of precluding a fair trial as a result of defense counsel's remarks in his opening statement. Furthermore, given such a record and the absence of any findings by the trial court, it could not second-guess the trial court's state of mind and presume that due consideration had been given to alternative means of remedying improper prejudice, if any, other than declaring a mistrial.

B. The Claimed Offending Remarks Made During the Defense Opening Statement Were Not Error Under Arizona Law.

The portion of defense's opening statement which Petitioner asserted and the trial court found were error and warranted a mistrial were claims that evidence would establish (1) that the prosecution had purposely withheld evidence from the defense, and (2) that because of such misconduct the Arizona Supreme Court had granted a new trial in this case. (App. 184, 271-272.) The Petitioner claimed that these matters could not have been proven at trial, and in particular, asserted that bringing up the

fact of prosecutorial misconduct was error. (*E.g.*, Petitioner's Brief 125.) The Petitioner's argument is contrary to Arizona law.

Arizona is committed to permitting accused persons in criminal proceedings an extremely broad scope of cross-examination and impeachment concerning bias, prejudice, motive and interest of the prosecution and its witnesses. *E.g.*, *State v. Ramos*, 108 Ariz. 36, 492 P. 2d 697 (1972); *State v. Reynolds*, 104 Ariz. 149, 449 P. 2d 614 (1969); *State v. Burruell*, 98 Ariz. 37, 401 P. 2d 733 (1965); *State v. Torres*, 97 Ariz. 364, 400 P. 2d 843 (1965); *State v. Holden*, 88 Ariz. 43, 352 P. 2d 705 (1960); *State v. Little*, 87 Ariz. 295, 350 P. 2d 756 (1960); *State v. Aldrich*, 75 Ariz. 53, 251 P. 2d 653 (1952); *State v. Rothe*, 74 Ariz. 382, 249 P. 2d 946 (1952); *Gibbs v. State*, 37 Ariz. 273, 293 P. 976 (1930); *Fuller v. State*, 23 Ariz. 489, 205 P. 324 (1922); *State v. Small*, 20 Ariz. App. 530, 514 P. 2d 283 (1973); *State v. Ornelas*, 15 Ariz. App. 580, 490 P. 2d 25 (1971); *State v. Butler*, 9 Ariz. App. 162, 450 P. 2d 128 (1969); *State v. Cadena*, 9 Ariz. App. 369, 452 P. 2d 534 (1969); *State v. McMurtry*, 10 Ariz. App. 344, 458 P. 2d 964 (1969); *State v. Taylor*, 9 Ariz. App. 290, 451 P. 2d 648 (1969).

> The jury has a right to know any fact which tends to show a witness is biased, prejudiced or hostile in passing on that witness' credibility. *State v. Ramos*, 108 Ariz. 36, 39, 492 P. 2d 697, 700 (1972).

Certainly, the fact of deliberate prosecutorial withholding of exculpatory evidence was admissible insofar as the Arizona courts have held that defense counsel should be allowed to examine witnesses to show that a conspiracy exists among prosecutorial personnel or agents to improperly obtain a conviction of the accused. *State v. Small*, 20 Ariz. App. 530, 534, 514 P. 2d 283, 287 (1973). Indeed, in some cases, the defense has been permitted to call the prosecuting attorney in an attempt to impeach witnesses. *See, e.g., State v. Little*, 87 Ariz. 295, 307, 390 P. 2d 756, 764 (1960).

Here, the prosecutor argued to the trial court that the State's case would be prejudiced by the revelation that the prosecution

had previously sought to secure a conviction by improper means. It cannot be disputed that the prosecution's willingness to adopt devious and improper tactics is highly relevant to the believability of its witnesses, and for that reason, Arizona permits such matters to be received in evidence. *Infra* at page 15.

Of course, any successful attack on the credibility of prosecution witnesses does damage to the State's case. In that sense, the prosecution's claim of prejudice here is like that of the prosecutor in *Scarborough v. Arizona*, 531 F.2d 959, 961 (9th Cir., 1976), where it was argued that an instruction to disregard his improper argument would have detracted from his argument. Here, the prosecution argued that the broader and more deceitful the prosecution's efforts to obtain conviction by improper means, the less admissible such matters would be, since in Petitioner's view, they would put the State on trial. If by prejudice, the Petitioner means loss of credibility, then certainly the establishment in evidence of its past misconduct would be "prejudicial," but it would not be improper.

The nature of the opening statement in this case is virtually identical to that in *State v. Burruell*, 98 Ariz. 37, 401 P. 2d 733 (1965). There defense counsel made an opening statement (the pertinent portion of which is quoted in 98 Ariz. at 41-42, 401 P. 2d at 736-737) in which he claimed that the defendant had been "framed" by the prosecution's star witness, an informer, who was paid to buy drugs from the defendant. Further, defense counsel maintained that the sheriff's department had reported to the prosecutor's office that the informant was guilty of other crimes, but the prosecutor chose not to prosecute the informant and instead used those charges to pressure him. Just as in the instant case, the *Burruell* prosecutor did not object during the opening statement, but thereafter moved for a mistrial on the grounds that the defense counsel's opening statement had done "irreparable harm" to the trial of the case, and that no instruction from the court could "wipe the slate clean." The mistrial motion was granted and the Arizona Supreme Court held the granting of the motion to have been error and to have barred retrial. Without reference to alternatives to a mistrial, the Arizona Supreme Court

held that for purposes of a mistrial motion, it must be assumed that the defense counsel produce the evidence set forth in his opening statement, and further held that the matters referred to would have been admissible. 98 Ariz. at 42 & 44, 401 P. 2d at 737-738.

Rule 272, 1956 Arizona Rules of Criminal Procedure, superceded Volume 17, Arizona Revised Statutes Annotated, which was obviously designed to protect defendants, *Hopt v. Utah*, 120 U.S. 430 (1887), does not make reference to the former trial improper where it had previously been referred to by the prosecutor. (App. 151 & 170.) *State v. Downey*, 104 Ariz. 375, 378-79, 453 P. 2d 521, 524-525 (1960). *Cf. Carsey v. United States*, 392 F.2d 810 (D.C. Cir., 1967). If the prosecutor here was objecting to a statement of the grounds upon which the second trial was granted, it is ironic. Earlier, in his own opening statement, the prosecutor was permitted, over objection, to say that, as a result of the magistrate's decision at Mr. Washington's preliminary hearing, based upon evidence there presented, the information against Mr. Washington was filed. (App. 169-170.)

Although defense counsel's remarks in his opening statements did not require consideration by the jury of the Arizona Supreme Court's Opinion, that too might have been permissible. A judgment in a criminal proceeding is receivable as evidence of a relevant fact in another criminal proceeding against the same person and is generally conclusive. *State v. Little*, 87 Ariz. 295, 304, 350 P. 2d 756, 762 (1960). *See also, State v. Davis*, 108 Ariz. 75, 492 P. 2d 1183 (1972); *Stewart v. Smith*, 73 Ariz. 70, 237 P. 2d 803 (1951). *Cf. Morrison v. Perry*, 167 Okl. 459, 30 P. 2d 670 (1934). And *Cf. State v. Cadena*, 9 Ariz. App. 369, 371-373, 452 P. 2d 534, 536-538 (1969); *State ex rel. DeConcini v. Superior Court*, 20 Ariz. App. 33, 35, 509 P. 2d 1070, 1072 (1973). Arizona Supreme Court Rule 48(c), 17 Arizona Revised Statutes Annotated, does not preclude the use of a memorandum decision, as in this case, to establish the law of the case or to conclusively establish a fact or ruling of law contested by the same parties and decided in that decision; it is

only a bar to the use of such decisions as legal precedent in other cases.

Not only was the defense's intent to use the prior prosecutorial misconduct revealed in the voir dire of the jury (Transcript of Defense Voir Dire 22); according to the prosecutor, he replaced the prosecutor from the first trial because it was believed the first prosecutor would have to testify regarding matters that formed the basis of the retrial. (App. 201.) Clearly, the statement that the defense intended to prove the prior misconduct therefore came as no surprise.

It is worth noting that the Petitioner in its briefs to the Arizona Supreme Court opposing retrial *never* claimed that the withholding of evidence was not deliberate; rather it claimed (as the Arizona Supreme Court Opinion reflects) that said evidence was not material to the defense and was withheld in good faith. The prosecutor admitted to the trial court "that the motion for a new trial was granted because the State failed to produce some evidence." (Transcript of Defense Voir Dire 35.) *See also*, Petitioner's Brief 37. (The jury "now had knowledge of the reason for the new trial.") In light of this and the Opinion of the Arizona Supreme Court (App. 7-15 & 35), Petitioner's argument (Petitioner's Brief 21-22, etc.) "that the [Arizona Supreme] Court did not concur with Washington that the suppression was the product of . . . deliberate or intentional conduct by the State" is pure sophistry and smoke screen.

C. Mr. Washington's Retrial is Barred by Double Jeopardy.

Since the remarks upon which the trial judge founded his grant of a mistrial were not error, the granting of a mistrial was improper and jeopardy attaches. *E.g., State v. Burruell*, 98 Ariz. 37, 401 P. 2d 733 (1965). There are no interests at stake countervailing Respondent's interest in having his trial completed by a particular tribunal, in avoiding the ordeal, anxiety and insecurity of another trial, and in avoiding the enhanced

possibility offered by repeated attempts to convict that, though innocent, he might be found guilty. *E.g., Downum v. United States,* 372 U. S. 734, 736 (1963). Each of the foregoing U.S. 184, 187-188 (1957).

Defense counsel submits for the foregoing reasons that his reference to the decision of the Arizona Supreme Court concerning Respondent was proper. Assuming, *arguendo*, that it was error, the inquiry must focus upon whether the mistrial declaration was required by "manifest necessity" or "the ends of public justice." *E.g., Illinois v. Somerville*, 410 U. S. 458 (1973); *United States v. Jorn*, 499 U. S. 470 (1971); *Downum v. United States*, 372 U. S. 734 (1963); *United States v. Perez*, 22 U.S. 579 (1824).

The Double Jeopardy Clause safeguards those accused in criminal proceedings from a variety of oppressive circumstances. A litany of some of the circumstances was provided by *Green v. United States*, 355 U. S. 184 (1957).

> The State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal, and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that, even though innocent, he may be found guilty. *Green v. United States*, 355 U.S. 184, 187-188 (1957).

The Double Jeopardy Clause also protects accused persons from the delays occasioned by repeated prosecutions. *United States v. Dinitz*, 424 U. S. 600, 608 (1976). Moreover, where a trial judge is asked to abort a trial, the Double Jeopardy Clause protects an accused person's "valued right" to have his trial completed by a particular tribunal, i.e., his option to go to the jury at hand and perhaps end the dispute then and there, once and for all, with an acquittal. *United States v. Dinitz*, 424 U. S. 600, 606 (1976); *Illinois v. Somerville*, 410 U. S. 458, 466 (1973); *United States v. Jorn*, 400 U. S. 470, 484-485 (1971); *Downum v. United States*, 372 U. S. 734, 736 (1963). Each of the foregoing safeguards was abridged by the declaration of a mistrial in Mr.

Washington's second trial.

Although any retrial probably results in additional embarrassment, ordeal, continuing anxiety, insecurity, and delay for an accused person, the anxiety, ordeal, and delay here were aggravated. Mr. Washington had the possibility of spending the rest of his life in prison hanging over his head, if convicted, and he had already spent more than four years imprisoned on a charge for which he had never been validly convicted. For him, the second trial was a beacon at the end of a long and torturous journey. He had already been severely punished, though he was presumed innocent, and care should have been taken to spare him further unnecessary punishment.

His pre-trial ordeal and continuing imprisonment, of course, fueled his interest and desire in going forward with the jury which had already been selected and heard evidence. But there was more than that impelling him to seek completion of his trial. For Mr. Washington, the chance of obtaining an acquittal was more than a mere hope. The prosecution had no eyewitnesses who identified him as being involved in the crime. A number of past and present prosecution witnesses, in fact, had either positively declared that Mr. Washington was not involved or had given descriptions of a suspect which were inconsistent with Mr. Washington's appearance. And Mr. Washington had a witness who could confirm his alibi.

The declaration of a mistrial prejudiced Mr. Washington, enhanced the possibility that, though innocent, he could be convicted, and was subject to prosecutorial manipulation. *E.g., Downum v. United States*, 372 U. S. 734 (1963); *Carsey v. United States*, 392 F.2d 810 (D.C. Cir., 1967). The motion for mistrial was made by the prosecutor after he had been provided with a complete revelation of the defense's strategy, and the matters it intended to prove. It was made after the prosecutor had an opportunity to observe how the jurors were responding to his presentation of evidence. It was made after the prosecutor's threat of reprisal and smear tactics toward defense counsel (*e.g.* Transcript of Defense Voir Dire 55, App. 189-190) had been unsuccessful in dissuading the defense from impeaching the

prosecution's witnesses with evidence of its past attempts to improperly obtain a conviction of Mr. Washington. And it was made after the prosecutor learned of the defense's intention to produce the testimony of witnesses which the prosecutor had thought unavailable to the defense. (*E.g.*, App. 189, 194-196.)

Thus, the motion for mistrial allowed the prosecutor to abort a trial when he felt his case was weakening, and to utilize the time between trials to strengthen his case. Given the fact that one potential defense witness had died during the interval between the first and second trials (App. 175), and there was difficulty in locating other witnesses (App. 192), which was understandable where the crime occurred in a downtown flophouse hotel, only the prosecution could be expected to benefit and only the defense be prejudiced by an additional delay and the probable resulting inavailability of defense witnesses.

Here there are none of the factors present which warrant abandonment or relaxation of the manifest necessity standard. Mr. Washington's is not a case in which a mistrial was declared solely to benefit the accused, *Gori v. United States*, 367 U. S. 364 (1961), nor where the accused moved for a mistrial, *United States v. Dinitz*, 424 U.S. 600 (1976). This case does not involve an obvious procedural error rendering continuation of trial fruitless, like that in *Illinois v. Somerville*, 410 U. S. 458 (1973).

Application of the Double Jeopardy Clause involves a balancing of the accused person's interests against "the public's interest in fair trials designed to end in just judgments." *Illinois v. Somerville*, 410 U. S. 458, 463 (1973). Thus it is appropriate to ask whether an impartial verdict could have been reached in the trial that was ongoing. The evidence of prosecutorial misconduct was unquestionably admissible under Arizona law. The prosecutor had first opened the door to the existence of a prior trial. The trial was to be a lengthy one. Therefore, arguing that the single mention of the existence of an Arizona Supreme Court decision sanctioning retrial on the basis of prosecutorial withholding of evidence would irrevocably prejudice a jury and render it unable to reach an impartial verdict, strains credulity.

In such a situation, a meaningful determination of manifest necessity cannot be made without scrupulous consideration of available alternatives to declaring a mistrial, alternatives which would accommodate both the interests of the public and the accused individual. *United States v. Jorn*, 400 U. S. 470 (1971). The bulk of argument on the mistrial motion concerned admissibility of evidence, and the trial court made no statements indicating that it had considered the alternatives to mistrial mentioned by defense counsel or found them unrealistic or unworkable. The prosecutor argued without explanation that cautionary instructions were unsatisfactory alternatives (App. 200) at the time his mistrial motion was denied. Thus, the record gives every appearance that the motion for mistrial was ultimately granted because the trial court believed the opening statement remarks were error, without finding a manifest necessity for aborting the trial. (App. 32.) Indeed, the court's erratic behavior in first denying a mistrial and then granting it based upon virtually the same arguments suggests an arbitrary decision and a failure to follow Constitutional Double Jeopardy standards. *United States v. Jorn*, 400 U. S. 470 (1971).

D. Where a Mistrial is Requested Over the Defendant's Objection and is Asserted to be Occasioned by Matters Causing Jury Prejudice, this Court Should Require the Trial Judge to Make a Record of Consideration of Alternatives to Retrial.

Where a mistrial is requested over the defendant's objection and is asserted to be occasioned by matters causing jury prejudice, the mistrial cannot be manifestly necessary if there are workable alternatives which will provide an impartial verdict. And a court that ignores or fails to consider such alternatives abuses its discretion. *United States v. Jorn*, 400 U. S. 470 (1971). When Constitutional rights turn on the resolution of a factual dispute, Federal courts are required to make an independent examination of the evidence in the record. *E.g.*,

Brookhart v. Janis, 384 U. S. 1, 4 n. 4 (1966); *Edwards v. South Carolina*, 372 U. S. 229, 235 (1963); *Blackburn v. Alabama*, 361 U. S. 199, 205 n. 5 (1960).

How is an appellate court to determine whether a trial court considered the "manifest necessity" of a mistrial when it does not state any findings or remarks indicating consideration of alternatives? Petitioner suggests that an appellate court speculate regarding the trial court's cognitive processes and infer fair consideration of alternatives solely because they have been mentioned by counsel. (Petitioner's Brief 114-115.) Obviously, it would be just as reasonable to infer from the trial court's silence regarding alternatives that it gave no consideration to the alternatives mentioned or rejected them for arbitrary or frivolous reasons.

A simpler and eminently fairer approach would be to require trial courts to make their consideration of alternatives to declaring a mistrial explicit in the record. A recent commentator argues persuasively:

> When mistrial has been declared, a court examining a double jeopardy claim must assure itself that the defense had an opportunity to air its views, that these views were *considered*, and that the trial judge reached a reasoned decision. A trial judge who rejects an alternative for no reason or for a patently frivolous reason will not have provided the minimal attention to double jeopardy interests that is always appropriate, and retrial should be barred. Schulhofer, "Jeopardy and Mistrials." 125 U. Pa. L. Rev. 449, 517 (1977).

Once a trial judge's consideration of alternatives is explicit in the record, there is no need to speculate. An appellate court can then give due deference to the trial judge's first-hand opportunity to observe without abdicating its own responsibility to maintain the guarantee of the Double Jeopardy Clause. Thus, with a trial court's determination of "manifest necessity" opened to the light of examination, it can be presumed proper unless the record speaks loudly and decisively to the contrary.

II.

THE ISSUE OF WHETHER DEFENSE COUNSEL DELIBERATELY PROVOKED A MISTRIAL IS NOT PROPERLY BEFORE THIS COURT, IS NOT SUPPORTED BY THE RECORD, AND DEFENSE INVOLVEMENT IN THE GROUNDS FOR MISTRIAL HEREIN SHOULD NOT OVERRIDE THE DEFENDANT'S DOUBLE JEOPARDY INTERESTS IN THIS CASE.

A. The Issue of Deliberate Defense Provocation of a Mistrial Cannot be Raised for the First Time in This Court.

The Petitioner's Petition for Writ of Certiorari should be dismissed as improvidently granted or, in the alternative, the Petitioner's fourth question presented should be denied consideration, for the reason that said question raises an issue not heretofore raised before any court. In addition to the fact that the allegation that defense counsel in this case acted in bad faith or intentionally provoked a mistrial is untrue and scurrilous, notably that issue was never raised or claimed in the Arizona Superior Court, the Arizona Supreme Court, the United States District Court or the United States Court of Appeals.

In the United States Court of Appeals, the Petitioner presented two issues: (1) whether a trial judge must make findings of manifest necessity or irrevocable jury bias when declaring a mistrial, to avoid claims of double jeopardy, and (2) whether the District Court should have permitted the State to reopen its evidence and introduce "testimony" of the trial judge that his ruling was based upon a finding of manifest necessity. (Appellee's Opening Brief at 18.) Although Petitioner's arguments to the United States Court of Appeals for the Ninth Circuit contained venal criticism of defense counsel's representation of his client, the issue here raised was not submitted in that or any other court. The Petitioner came closest to raising it for

the first time below when the following two sentences were inserted in widely separated portions of the Court of Appeals brief:

> While it may at times be difficult for a judge to distinguish excessive zeal or incompetence from intentional precipitation of mistrial, here the anomaly must give way to defense counsel knowingly (or should have known he was) bringing about the mistrial ruling. (Appellee's Opening Brief at 48.)
>
> Washington, through the bad-faith conduct of his counsel, cannot bait the court and the prosecutor into a mistrial ruling and then hop under the Constitution for protection. (Appellee's Opening Brief at 66.)

In Appellant's Reply Brief at 22, Respondent noted that the foregoing accusations "were never made in any of the myriad of previous Court proceedings," and declined to dignify them by a response unless the Court of Appeals requested a response. No response was requested.

Matters raised for the first time before this Court are generally not considered. *E.g., Tacon v. Arizona*, 410 U. S. 351 (1973); *United States v. Estate of Donnelly*, 397 U.S. 286, 295 n. 5 (1970); *Cardinale v. Louisiana*, 394 U. S. 437 (1969); *Lawn v. United States*, 355 U. S. 339, 362-363 n. 16 (1958).

B. Defense Provocation of Mistrial is Not Supported by the Record.

There was no intentional provocation of a mistrial by defense counsel in this case. A party should not be permitted to use unfounded vilification of a party's attorney as an entree to this Court. Indeed, the very length and adversary nature of the argument over Petitioner's motion for mistrial gives the lie to the allegation that Respondent's counsel deliberately sought a mistrial. Similarly, the provoking of a mistrial would have been reason for the court to invoke its contempt powers and discipline the attorney responsible. *E.g., Weiss v. Burr*, 484 F.2d 973, 982 (9th Cir., 1973), *cert. denied*, 414 U. S. 1161 (1974). Moreover, in view of the weakness of the prosecutor's case and the

availability of substantial exculpatory evidence, the defense confronted the strong possibility of an acquittal. Provocation of a mistrial would have been contrary to Mr. Washington's interests.

The argument that the defense in this case provoked a mistrial, in addition to being improper and untrue, is an insidious invitation to myopic examination of this case. It is as if one judged who was at fault in causing a fist fight by noting who struck the last blow, without reference to what led up to that event. In this case, the prosecutor provoked the remarks he later complained of. Over objection, he disclosed to the jury the existence of two prior proceedings at which testimony was taken four years before the insant trial. (App. 151.) This should have been regarded as error in view of Rule 314, 1956 Arizona Rules of Criminal Procedure, superceded Volume 17, Arizona Revised Statutes Annotated. ("When a new trial is granted, the new trial shall proceed in all respects as if no former trial had been had.") *Compare, State v. Downey*, 104 Ariz. 375, 378-379, 453 P. 2d 521, 524-525 (1969) (mention of prior proceedings not reversible error where defense counsel referred to them first); *People v. Kessler*, 221 Cal. App. 2d 187, 192, 34 Cal. Rptr. 433, 436 (1963) (mention and calling of probation officer as witness indirectly referred to former trial and was grounds for reversal).

The prosecutor first introduced the jurors to the fact of retrial, at the least by a strong inference. He sought to use that fact to bolster the credibility of his witnesses, arguing to the jury that the four year time lapse should be viewed as an explanation for the inconsistent statements of the State's witnesses. The defense responded by conceding the retrial and utilizing the matters which the prosecutor admitted had caused the retrial (Transcript of Defense Voir Dire 35), the suppressed inconsistent, but exculpatory statements, to attack the credibility of the prosecution's witnesses.

C. Defense Involvement in the Asserted Grounds for Mistrial Does Not Warrant a Deviation from the Manifest Necessity Standard.

Petitioner has urged that the manifest necessity standard be abandoned here because the mistrial declaration was based on alleged defense misconduct. No basis exists in this case for departing from the standard of manifest necessity. Where a mistrial is based upon some asserted defense misconduct, the courts have nevertheless applied the manifest necessity standard. *E.g., United States v. Tinney*, 473 F.2d 1084 (3rd Cir.), *cert. denied*, 412 U. S. 928 (1973); *Carsey v. United States*, 392 F.2d 810 (D.C. Cir., 1967); *Espinoza v. District Court*, 180 Colo. 391, 506 P. 2d 131 (1973); *United States v. Bristol*, 325 A. 2d 183 (D.C. Cir., 1974); *State v. Sedillo*, 88 N. M. 240, 539 P. 2d 630 (1975); *Commonwealth ex rel. Riddle v. Anderson*, 227 Pa. Super. Ct. 68, 323 A. 2d 115 (1974).

Such cases recognize the real world where imperfect humanity, difference of opinion, uncertainty or error regarding the law, and courtroom zeal and passion are more likely to result in errors than deliberately provocative conduct. They also recognize that the public, and not just accused persons, has an interest in the speedy, economical and final resolution of criminal cases, and require that alternatives to retrial be utilized where practical.

Were the manifest necessity standard not utilized in matters of asserted defense misconduct, the prosecutor could obtain mistrials virtually at will. He could substitute motions for mistrial where a simple objection would normally be appropriate. Such a result would occasion danger of prosecutorial manipulation and disruption of the criminal justice system. Errors for which an accused person would not be entitled to mistrial, would constitute mistrial grounds on the prosecution's motion. Thus, the threat of an automatic mistrial on the prosecutor's motion would stand as a weapon by which he could control the manner of presentation of the defense case in the absence of the manifest necessity standard.

CONCLUSION

For the reasons expressed herein, it is respectfully urged that the judgment of the court below be affirmed.

Respectfully submitted this 24th day of August, 1977.

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